Supreme Court, U.S.
FILED
MAY 11 2000
CLERK

No. 99-1638

IN THE

Supreme Court of the United States

BRONNER BROS., INC.,

Petitioner,

v.

TERI M. BLOUNT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

A. MCARTHUR IRVIN
Counsel of Record
SANDRA KAYE
IRVIN, STANFORD & KESSLER, LLP
Attorneys for Respondent
One Buckhead Plaza, Suite 1050
3060 Peachtree Road, N.E.
Atlanta, Georgia 30305
(404) 237-1020

159708

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

	Page
Table Of Cited Authorities	iii
Statement Of The Case	1
A. Petitioner's Statement Contains Irrelevant And Non-Fact Based Sections	1
B. An Objective Statement Of The Procedural History	2
C. The Petition Significantly Misrepresents The Eleventh Circuit's Unpublished Decision ..	5
Reasons For Denying The Writ	6
I. Petitioner's Argument Is Contrary To Petitioner's Argument In The Courts Below	7
II. By Ignoring The Language Of The Eleventh Circuit's Decision Finding Its Argument "Frivolous" And Relying On A 1987 Third Circuit And Inapplicable Decisions, Petitioner Misrepresents The Existence Of A Conflict Between The Circuits And The Lack Of Supreme Court Guidance	9
A. There Is No Substantive Circuit Court Decision In This Case And, Therefore, No Decision That Conflicts With Any Decision	9

Contents

Page

B. Subsequent Decisions Establish That The Third Circuit Reviews Entries Of Default And Dismissals Under The Same Deferential Abuse Of Discretion Standard As Is Used By Other Circuits And Prescribed By This Court 9

C. The Cases Relied On By Petitioner Do Not Require Consideration Of Other Sanctions In Cases, As This, Where Default Is Entered For Failure To Answer And Promptly Respond To Motions Concerning Default And The Court's Entry Of Default 13

Conclusion 15

TABLE OF CITED AUTHORITIES

Page

Cases:

Anilina Fabrique de Colorants v. Aakash Chemicals and Dyestuffs, Inc., 856 F.2d 873 (7th Cir. 1988) 14

Emcasco Ins. Co. v. Sambrick, 834 F.2d 71 (3d Cir. 1987) 7, 8, 10, 14

Mindek v. Rigatti, 964 F.2d 1369 (3d Cir. 1992) 10, 11, 12

National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 96 S. Ct. 2778 (1975) 11, 12

Poulis v. State Farm Fire and Casualty Co., 747 F.2d 863 (3d Cir. 1984) 10

United States v. Moradi, 673 F.2d 725 (4th Cir. 1982) 13

Cited Authorities

Page

Rules:

Fed. R. Civ. P. 11 6

Fed. R. Civ. P. 37 12

Fed. R. Civ. P. 55(c) 7

United States Supreme Court Rule 10 6

United States Supreme Court Rule 10(a) 7

United States Supreme Court Rule 10(c) 7

STATEMENT OF THE CASE

Petitioner's Statement of the Case ("Statement") is deficient from three standpoints. First, the Statement includes a section irrelevant to the Questions Presented. Second, the Statement includes one section based on no facts of record that seems to be Petitioner's attempt to evoke sympathy for its failure to answer a lawsuit. Third, the Statement is, at best, not entirely accurate and, at worst, contains a significant misrepresentation.

A. Petitioner's Statement Contains Irrelevant And Non-Fact Based Sections

Considering that the Questions Presented concern the propriety of the entry of default judgment, section D. of the Statement, "Trial on the Issue of Damages," is improperly included.

Furthermore, Petitioner's one paragraph purported synopsis of the two day trial is neither complete nor accurate. However, because of the lack of relevance of the trial to the propriety of the entry of default judgment, Respondent will not burden the Court with a detailed discussion of the numerous admissions of Bernard Bronner and Bronner Bros. and other testimony at trial.[1]

---

1. Respondent would, however, briefly mention that, among other things, Bernard Bronner — the highest management official in Bronner Bros., responsible, in his words, for "everything" regarding the company — admitted that he inappropriately and wrongfully touched Blount. (R.5-124, 130). Bronner also admitted sexually harassing Blount and another employee. (R.5-118-19). Bronner admitted that he discharged Blount on the airplane because of his conversation with her fiance, Woods, and that, if not for the conversation, Blount would not have been terminated. Bronner further admitted that the termination was retaliatory and wrongful. (R.5-34-35, 137).

While section B. of the Statement, "Bronner Bros.' Default," appears relevant, it has no factual basis. Rather, it is an attempt by a 53 year company of 350 employees to evoke sympathy for its failure to do what millions of others confronted with a lawsuit have managed to do: obtain an attorney and effectively file an answer.

B. An Objective Statement Of The Procedural History

Section C. of the Statement, "Procedural History," omits certain facts. Respondent respectfully submits that the Eleventh Circuit's chronology is a more objective statement of the procedural history. It is set forth herein verbatim; Respondent is adding, in footnotes, additional relevant facts:

> July 26, 1995: Suit filed.
>
> July 29: Request for waiver of service mailed to defendant.
>
> October 11: Defendant refused waiver of service.[2]
>
> October 25: Service perfected on defendant.

---

2. Bronner Bros. refusal to waive service of summons, thereby increasing the cost of litigation, was consistent with its position taken prior to the filing of the Complaint. In a letter mailed to Blount's counsel in response to an inquiry about the possibility of resolving the matter without resort to litigation, Bronner Bros. stated that it was "prepared to submit all necessary resources to defend" Bronner Bros. from Blount's claims.

November 14: Defendant filed motion to extend time to answer through November 27.[3] No answer filed.[4]

January 19, 1996: Request by plaintiff for entry of a default.

February 5: Default entered.

February 6: Motion by plaintiff for judgment by default as to liability.

February 29: Magistrate ordered entry of default.[5]

May 6: Report and recommendation by magistrate that default judgment be entered.

---

3. The motion specifically stated that an extension was needed so that Bronner Bros. could "retain counsel and otherwise respond to the complaint" and was served on Blount's counsel.

4. Petitioner has claimed that it attempted to file a *pro se* answer, even though, as noted by the district court, it has long been the rule that corporations cannot appear *pro se*. Notably, the alleged answer was not served on Blount's counsel although Petitioner managed to serve the extension motion. Furthermore, contrary to Petitioner's admission in the Petition for a Writ of Certiorari (at page 3) that it "does not have a copy of" the answer, Petitioner contended throughout the litigation that a copy of the answer was saved on its computer. (R.1-11-Binder Aff. ¶5).

5. The filings of January 19, February 6 and February 29 — stating that Petitioner was in default — were all served on Petitioner; still, Petitioner filed nothing with the court.

May 22: Counsel for defendant first appeared. This was ten months after defendant received a copy of the complaint through the mail and refused to waive service; seven months after personal service; six months after defendant requested extension of time to answer; four months after plaintiff requested a default; three months after default was entered and plaintiff moved for entry of judgment by default.

Defendant moved to set aside default and objected to the magistrate's report and recommendation.

_____: District Judge ordered new report and recommendation in light of defendant's motion.

July 22, 1996: Magistrate recommended that motion to set aside default be denied and judgment by default entered. Defendant objected.

September 18: District judge held that default judgment was appropriate and adopted the recommendation of the magistrate refusing to set aside default.

June 26-27, 1997: Trial on compensatory and punitive damages only. Jury awards $75,000 compensatory damages and 200,000 punitive damages. Later the judge entered an order awarding attorney fees of $42,868, $9,000 plus for back pay, and fringe benefits of $2,578.05.

> November 4, 1997: Judgment entered for compensatory and punitive damages, back pay, fringe benefits, attorneys' fees and costs together with post-judgment interest.
>
> June 25 [1998]: Defendant's post-trial motions denied.

(App. A to Petition for a Writ of Certiorari).

C. The Petition Significantly Misrepresents The Eleventh Circuit's Unpublished Decision

The Petition for a Writ of Certiorari ("Petition") states "[t]he Eleventh Circuit recited a chronology of the case in its brief opinion, but did not explain its reasons for affirming the district court." (Petition at 7). This is a significant misrepresentation because the Eleventh Circuit's *unpublished* decision *does* state the reason for affirming the district court. After reciting the chronology, the Eleventh Circuit stated:

> Defendant's contention that the district court abused its discretion by entering a default judgment is frivolous. The court did not err in denying defendant's motion to set aside the default.

(App. A to Petition).

Petitioner's refusal to acknowledge that the Eleventh Circuit found "*frivolous*" its argument about the entry of the default judgment and to point out that the decision is *unpublished* is characteristic of Petitioner's approach to this

and related litigation. Throughout, Petitioner has asserted unfounded positions in order to delay, further harass Respondent, and avoid the inevitable.[6] Contrary to Petitioner's suggestion, certiorari is not appropriate in a case, such as this, in which the Circuit Court's decision is unpublished and found Petitioner's ultimate argument "frivolous."

REASONS FOR DENYING THE WRIT

Review on a writ of certiorari is, of course, an extraordinary circumstance, to occur, as stated in this Court's Rule 10, only where there are "compelling reasons." There is no reason, compelling or otherwise, for this Court to review an unpublished Circuit Court decision that summarily disposed of Petitioner's argument as "frivolous."

The circumstances identified in this Court's Rule 10 as justification for granting a petition for writ of certiorari in no way suggest that the petition in this case should be granted. Because the Eleventh Circuit's unpublished decision summarily disposed of Petitioner's argument concerning the

6. A prime example was the declaratory judgment action brought in the United States District Court for the District of Maryland, Civil Action No. CCB-97-2392, by Bernard Bronner against Respondent (Blount in this case, Woods — her married name — in the Maryland case) subsequent to Respondent's success in the trial on damages. Upon Respondent's motions, that action was dismissed and Rule 11 sanctions awarded against Petitioner's former counsel for the continuation of that action. The court concluded that the declaratory judgment action was continued for "an improper purpose, unfounded in law or fact, that would have allowed Mr. Bronner to harass and punish Ms. Woods for the failure of Mr. Bronner's company to respond on time to Ms. Woods' complaint in the prior litigation." (Court's Memorandum dated July 13, 1998 at page 14).

entry of default judgment as "frivolous," there is not "a United States court of appeals . . . decision in conflict with the decision of another United States court of appeals on the same important question." Rule 10(a). Likewise, because the Eleventh Circuit's unpublished decision summarily disposed of Petitioner's argument concerning the entry of default judgment as "frivolous," "a United States court of appeals has [not] decided an important question of federal law that has not been, but should be, settled by this Court." Rule 10(c).

Furthermore, the petition should be denied because Petitioner asserts certain arguments which are contrary to the arguments made by Petitioner in the courts below. Additionally, the petition should be denied because, contrary to Petitioner's argument herein, there is no conflict in the circuits concerning the issues raised. Finally, the petition should be denied because this Court has spoken regarding similar issues.

I.

PETITIONER'S ARGUMENT IS CONTRARY TO PETITIONER'S ARGUMENT IN THE COURTS BELOW

The essence of Petitioner's argument is that in determining under Fed. R. Civ. P. 55(c) whether there is "good cause shown" for setting aside an entry of default, courts should be required to make explicit findings of fact regarding specific factors. In support of this position, Petitioner relies exclusively on a 1987 Third Circuit decision, *Emcasco Ins. Co. v. Sambrick*, 834 F.2d 71 (3d Cir. 1987).

However, at no previous time did Petitioner advocate this position or even cite *Emcasco*. In fact, Petitioner, in its reply brief filed in the Eleventh Circuit, vehemently denied that it was advocating the use of specific factors.

Specifically, in Respondent's brief filed in the Eleventh Circuit, Respondent suggested that Petitioner had advocated a position similar to that asserted herein — that a court must consider the factors Petitioner had extensively discussed in its brief. Petitioner responded to that suggestion as follows:

> This claim is outrageous. Bronner Bros. stated explicitly that a court need not find these four factors: "A court is not required to use these four factors; fewer or more factors could be used, as long as the factors used are an appropriate means of identifying circumstances which warrant a finding of 'good cause' to set aside a default." Brief of Appellant, at 17-18.

(Reply Brief at 1-2).

Having lost in the Eleventh Circuit on a more general good cause argument, Petitioner now asserts a position different than that it previously asserted. Such shifting of positions should not be permitted. A party should not be heard to complain about any matter, particularly one of its own making, for the first time in a petition for certiorari to this Court. For this reason alone, the petition should be denied.

II.

BY IGNORING THE LANGUAGE OF THE ELEVENTH CIRCUIT'S DECISION FINDING ITS ARGUMENT "FRIVOLOUS" AND RELYING ON A 1987 THIRD CIRCUIT AND INAPPLICABLE DECISIONS, PETITIONER MISREPRESENTS THE EXISTENCE OF A CONFLICT BETWEEN THE CIRCUITS AND THE LACK OF SUPREME COURT GUIDANCE

A. There Is No Substantive Circuit Court Decision In This Case And, Therefore, No Decision That Conflicts With Any Decision

As indicated herein, the Eleventh Circuit summarily disposed of as "frivolous" Petitioner's argument that the district court abused its discretion by entering default judgment. Therefore, no Circuit Court decision in this case addresses substantively the entry of default. Consequently, there is no merit to Petitioner's suggestion that the unpublished decision in this case — affirming the unpublished lower court decisions denying Petitioner's motion to set aside default — creates a conflict with any decision.

B. Subsequent Decisions Establish That The Third Circuit Reviews Entries Of Default And Dismissals Under The Same Deferential Abuse Of Discretion Standard As Is Used By Other Circuits And Prescribed By This Court

A further problem with Petitioner's argument is that, short of Petitioner's conclusory assertion, there is nothing that suggests a conflict between the Third Circuit and every

other circuit regarding consideration of motions to set aside entry of default. In part, this is attributable to petitioner's reliance on a 1987 decision, *Emcasco Ins. Co. v. Sambrick*, 834 F.2d 71 (3d Cir. 1987), and its failure to consider subsequent decisions which establish that the Third Circuit reviews entries of default and dismissals under the same deferential abuse of discretion standard as is used by other circuits.

Emcasco, 834 F.2d at 73, relies on an earlier case, *Poulis v. State Farm Fire and Casualty Co.*, 747 F.2d 863, 868-70 (3d Cir. 1984), which considered the propriety of punitive dismissals and entry of defaults. *Poulis* is most commonly cited by the Third Circuit and district courts in that circuit in considering punitive dismissal and default issues.[7]

A 1992 decision, *Mindek v. Rigatti*, 964 F.2d 1369 (3d Cir. 1992), is instructive in establishing the evolution of the Third Circuit's approach to dismissals and defaults. In particular, and contrary to the position asserted by Petitioner herein, *Mindek* recognized that the *Poulis* factors "did not provide a magic formula whereby the decision to dismiss or not dismiss a plaintiff's complaint becomes a mechanical calculation easily reviewed by this Court." *Id.* at 1373.

---

7. As indicated by *Poulis*' discussion of "whether the trial court has abused its discretion in dismissing, or refusing to lift a default," 747 F.2d at 868, dismissals, which end plaintiffs' claims, and defaults, which impact defendants, are subjected to the same analysis. However, and as discussed *infra*, courts approach defaults involving more than mere failure to answer and dismissals for failure to comply with rules and orders differently than defaults, as here, for failure to answer and promptly respond to motions concerning default and the court's entry of default.

The court in *Mindek*, however, went even further in stating:

> As we have already recognized, not all of the *Poulis* factors need be satisfied in order to dismiss a complaint. *See C.T. Bedwell & Sons, Inc. v. Int'l Fidelity Ins. Co.*, 843 F.2d 683, 696 (3d Cir. 1988). Instead, the decision must be made in the context of the district court's extended contact with the litigant. Ultimately, the decision to dismiss constitutes an exercise of the district court judge's discretion and must be given great deference by this Court — a court which has no direct contact with the litigants and whose orders, calendar, docket and authority have not been violated or disrupted.
>
> Although we have held that "[d]ismissal is a harsh remedy and should be resorted to only in extreme cases," we nevertheless have recognized that "the scope of appellate review of an order of dismissal is extremely narrow, confined solely to whether the trial court has abused its discretion." *Marshall v. Sielaff*, 492 F.2d 917 (3d Cir. 1974).

Id.

The court in *Mindek* then cited this Court's decision in *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 96 S. Ct. 2778 (1975):

> "But here, as in other areas of the law, the most severe in the spectrum of sanctions provided by statute or rule must be available to the district

> court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent."

964 F.2d at 1374, quoting *National Hockey League*, 427 U.S. at 642-43, 96 S. Ct. at 2780-81.[8] Based on the foregoing, the Third Circuit in *Mindek* affirmed the district court's dismissal of the plaintiff's complaint. 964 F.2d at 1375.

As the above discussion indicates, the Third Circuit uses the same deferential abuse of discretion standard as other Circuits, and this Court has provided guidance on similar issues. In fact, it is not difficult to imagine any circuit, faced with the chronology recited by the Eleventh Circuit in its decision in this case, reaching the same conclusion: that Petitioner's "contention that the district court abused its discretion by entering a default judgment is frivolous. The court did not err in denying defendant's motion to set aside the default."

---

8. In *National Hockey League*, this Court considered the propriety of a dismissal under Fed. R. Civ. P. 37 for failure to timely comply with a district court's order to answer interrogatories. This Court reversed the Third Circuit, holding that the district court did not abuse its discretion in dismissing the case. 427 U.S. at 643, 96 S. Ct. at 2781.

C. The Cases Relied On By Petitioner Do Not Require Consideration Of Other Sanctions In Cases, As This, Where Default Is Entered For Failure To Answer And Promptly Respond To Motions Concerning Default And The Court's Entry Of Default

The cases relied on by Petitioner do not support Petitioner's contention that those circuits require "consideration of lesser sanctions where a defendant failed to answer in a timely fashion." (Petition at 19). Petitioner itself impliedly admits that this statement is not correct in that Petitioner later states that those cases indicate that "under certain circumstances," lesser sanctions must be considered. (Petition at 20).

Petitioner's reliance on *United States v. Moradi*, 673 F.2d 725 (4th Cir. 1982), is misplaced. The court therein stated that "[i]n the circumstances, we believe that since the District Court is permitted to impose less severe sanctions, it was not justified in refusing all relief." *Id.* at 728. This is *not*, as suggested by Petitioner, tantamount to a statement that a court must consider "lesser sanctions where a defendant failed to answer in a timely fashion."[9]

9. As mentioned, the court in *Moradi* focused on the "circumstances" which involved a timely filed *and served* answer that the court returned to counsel's office. Counsel did not learn of the return of the answer or subsequent notices because of his hospitalization. A motion for relief was filed immediately upon learning of the award of a default judgment. That decision is inapplicable to the case at bar in which there is no record of an answer having been filed; the alleged answer was not served, even though an extension motion was served; the motion for relief was filed three months after default was entered; and the failure to properly and promptly act was caused by the party — Petitioner — not an attorney. The court in *Moradi* emphasized that a party personally at fault, as here, is to be treated more harshly than a party whose counsel was at fault. 673 F.2d at 728.

Petitioner's reliance on *Anilina Fabrique de Colorants v. Aakash Chemicals and Dyestuffs, Inc.*, 856 F.2d 873 (7th Cir. 1988), is not merely misplaced; Petitioner misrepresents the decision. Petitioner characterizes the default judgment in that case as "entered primarily based on defendant's failure to file an answer." (Petition at 20). The court stated just the opposite, emphasizing that the case "does not simply involve failure to file an answer." *Id.* at 880.

Prior to making that statement, the court noted that it was much more inclined to uphold defaults for failure to answer: "the failure to file an answer when due is a serious default. We have upheld refusals to vacate default judgments where a defendant has failed to file an answer." *Id.*

Nor did the court in *Anilina* hold, as Petitioner implies, that alternative sanctions always must be considered. The Court merely held that default judgment " 'was too harsh under the circumstances.' " *Id.* at 878 (citations omitted).

Anilina, as indicated, does not support Petitioner's position. In fact, the decision strongly suggests that alternative sanctions need not be considered where, as here, the case involves failure to answer.

Finally, even *Emcasco*, 834 F.2d 71, involved a complicated factual context in which the defendant was involved in various miscommunications and an answer was filed a mere six weeks after due. In contrast, in this Petitioner's case, as noted by the Eleventh Circuit:

> Counsel for defendant first appeared . . . ten months after defendant received a copy of the complaint through the mail and refused to waive

> service; seven months after personal service; six months after defendant requested extension of time to answer; four months after plaintiff requested a default; three months after default was entered and plaintiff moved for entry of judgment by default.

(App. A to Petition). Furthermore, as discussed *supra*, subsequent Third Circuit decisions reject the notion that all factors, such as lesser sanctions, must be considered in every case.

CONCLUSION

There is no reason for this Court to review an unpublished Circuit Court decision that summarily disposed of as "frivolous" Petitioner's argument that the district court abused its discretion by entering a default judgment. For this and the other reasons discussed herein, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

A. McArthur Irvin
Counsel of Record
Sandra Kaye
Irvin, Stanford & Kessler, LLP
Attorneys for Respondent
One Buckhead Plaza, Suite 1050
3060 Peachtree Road, N.E.
Atlanta, Georgia 30305
(404) 237-1020